

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
EASTERN WASHINGTON REGION  
STATE OF WASHINGTON

CONCERNED FRIENDS OF FERRY COUNTY  
and DAVID L. ROBINSON,

Petitioners,

v.

FERRY COUNTY,

Respondent,

and

FUTUREWISE,

Intervenor.

Case No. 11-1-0003

**FINAL DECISION AND ORDER**

**I. SYNOPSIS**

On November 13, 2012, the Board held a Hearing on the Merits in Republic, Washington. The Board finds and concludes that Ferry County is not in compliance with the requirements of the Growth Management Act (GMA) relating to the designation of Mineral Resource Lands of Long-Term Commercial Significance under RCW 36.70A.070 and RCW 36.70A.170. Also, the Board finds and concludes that Ferry County is not in compliance with the requirements of the GMA by modifying, eliminating and or excluding adequate policies and development standards for resource lands under RCW 36.70A.060, RCW 36.70A.070, and RCW 36.70A.120. Petitioners failed to show GMA noncompliance relating to the designation of Forest Resource Lands.

**II. BURDEN OF PROOF AND STANDARD OF REVIEW**

For the purposes of Board review of the comprehensive plans and development regulations

1 adopted by local governments, the GMA establishes three major precepts: a presumption of  
2 validity; a “clearly erroneous” standard of review; and a requirement of deference to the  
3 decisions of local governments.

4  
5 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and  
6 amendments to them are presumed valid upon adoption:

7       Except as provided in subsection (5) of this section, comprehensive plans and  
8       development regulations, and amendments thereto, adopted under this  
9       chapter are presumed valid upon adoption.

10 The statute further provides that the standard of review is whether the challenged  
11 enactments are clearly erroneous:<sup>1</sup>

12  
13       The board shall find compliance unless it determines that the action by the  
14       state agency, county, or city is clearly erroneous in view of the entire record  
15       before the board and in light of the goals and requirements of this chapter.

16 In order to find the County’s action clearly erroneous, the Board must be “left with the firm  
17 and definite conviction that a mistake has been made.”<sup>2</sup>

18  
19 Within the framework of state goals and requirements, the Board must grant deference to  
20 local governments in how they plan for growth.<sup>3</sup>

21       In recognition of the broad range of discretion that may be exercised by  
22       counties and cities in how they plan for growth, consistent with the  
23       requirements of this chapter, the legislature intends for the board to grant  
24       deference to counties and cities in how they plan for growth, consistent with  
25       the requirements and goals of this chapter. Local comprehensive plans and  
26       development regulations require counties and cities to balance priorities and  
27       options for action in full consideration of local circumstances. The legislature  
28       finds that while this chapter requires local planning to take place within a  
29       framework of state goals and requirements, the ultimate burden and  
30       responsibility for planning, harmonizing the planning goals of this chapter, and  
31       implementing a county’s or city’s future rests with that community.

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1   RCW 36.70A.320(3).

2   *Dept. of Ecology v. PUD1*, 121 Wn.2d 179, 201 (1993).

3   RCW 36.70A.3201.

1 The burden is on Petitioners to overcome the presumption of validity and demonstrate that  
2 any action taken by the County is clearly erroneous in light of the goals and requirements of  
3 Chapter 36.70A RCW (the GMA).<sup>4</sup> Where not clearly erroneous, and thus within the  
4 framework of state goals and requirements, the planning choices of local government must  
5 be granted deference.  
6

### 7 8 **III. PROCEDURAL HISTORY**

9 The Petition for Review was filed on October 7, 2011.

10 On December 2, 2011, Ferry County filed a Motion for Summary Judgment. On December  
11 23, 2011, the Board entered an Order on Motion for Summary Judgment granting the  
12 motion in part and denying the motion in part as follows:  
13

- 14 • Issue 1: Issue 1 is dismissed.
- 15 • Issues 2 and 3: Petitioners may present legal briefing and arguments at  
16 the Hearing on the Merits on Issues 2 and 3 so long as those arguments  
17 are limited to the amendments adopted in Ferry County Ordinance No.  
18 2011-04 related to the subject of designating forest lands and mineral  
19 resource lands and the Future Land Use Map as amended.
- 20 • Issue 4: Petitioners cannot present any legal briefing or arguments on the  
21 issues of "designating" Agricultural Lands of Long-Term Commercial  
22 Significance and Notice of Designated Agricultural Resource Lands.  
23 Petitioners may, however, present legal briefing and arguments limited to  
24 the subject of "adequate Policies and development standards for resource  
25 lands including the setting of minimum lot sizes for agricultural lands in  
26 Ferry County Ordinance No. 2011-04 and Ferry County Ordinance No.  
2011-03," as presented in Petitioners' Issue 4.

27 On February 6, 2012, Ferry County renewed its Motion for Summary Judgment, again  
28 seeking dismissal of the Petition for Review (PFR) in its entirety. The Board denied the  
29 renewed motion, relying on the December 23, 2011 Order on Motion for Summary  
30 Judgment.  
31  
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<sup>4</sup> RCW 36.70A.320(2).

1 The Hearing on the Merits was held on November 13, 2012 in Republic, Washington with  
2 the Eastern Washington Regional Panel comprised of Presiding Officer Raymond L.  
3 Paolella and Board Members Chuck Mosher and Margaret Pageler (present by telephone).  
4 In attendance at the Hearing on the Merits were: attorney Tim Trohimovich, representing  
5 Concerned Friends of Ferry County, David L. Robinson, and Futurewise; Deputy  
6 Prosecuting Attorney L. Michael Golden, representing Respondent Ferry County; David L.  
7 Robinson; and Ferry County Planning Director Irene Whipple.  
8  
9

#### 10 IV. BOARD JURISDICTION

11 To invoke the Board's jurisdiction to review compliance with the GMA, a party with standing  
12 must comply with the statute's procedural requirements:  
13

- 14 a) file a petition for review that includes a detailed statement of issues presented for  
15 resolution by the Board;<sup>5</sup>
- 16 b) file the petition for review within 60 days after publication by the legislative body of  
17 the county;<sup>6</sup> and
- 18 c) allege that the government agency is not in compliance with the requirements of the  
19 GMA.<sup>7</sup>

20 The Board finds and concludes that the Petitioners have standing and complied with the  
21 GMA's procedural requirements to invoke the Board's jurisdiction. The Board has  
22 jurisdiction to hear and decide the issues presented for review in this case.  
23

#### 24 V. DISCUSSION AND ANALYSIS

25 **Issue 2:** Do the criteria, policies, and narrative for designating forest lands of long-term  
26 commercial significance and the Future Land Use Map as amended in Ferry County  
27 Ordinance No. 2011-04 fail to comply with RCW 36.70A.020(8), -.040, -.050, -.060, -.070, -  
28 .170(1)(b), and WAC 365-190-060 and substantially interfere with the GMA goals (RCW  
29 36.70A.020)?  
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31 <sup>5</sup> RCW 36.70A.290(1).

32 <sup>6</sup> RCW 36.70A.290(2). In addition to the GMA, the Board also has jurisdiction to hear and determine certain  
petitions alleging noncompliance with the Shoreline Management Act and the State Environmental Policy Act.

<sup>7</sup> RCW 36.70A.280(1)(a).

1 Preliminary Matter: In their Reply Brief under Issue 2, Petitioners present new legal  
2 arguments relating to Ferry County Ordinance Nos. 2012-04 and 2012-06 (adopted on  
3 September 24, 2012). Petitioners request the Board take official notice of these two  
4 ordinances.<sup>8</sup> These 2012 Ordinances were adopted well after the inception of this case,  
5 and are not before the Board in the present case. Under RCW 36.70A.290(1), the Board  
6 cannot issue advisory opinions on issues not presented to the Board in the statement of  
7 issues, as modified by any prehearing order. In the present case, Petitioners' PFR  
8 challenged Ferry County's adoption of Ordinances 2011-03 and 2011-04, both passed on  
9 August 8, 2011. The Board lacks statutory authority to expand the scope of review beyond  
10 those actions challenged and those issues stated in the PFR. Moreover, new legal issues  
11 cannot be raised in a reply brief. Accordingly, the Board will not address any legal  
12 arguments related to Ordinance Nos. 2012-04 and 2012-06 in this Final Decision and Order  
13 (FDO).  
14  
15

16 **Applicable Law**

17 The GMA's Planning Goals guide the development of comprehensive plans and  
18 development regulations. Planning Goal 8 states:  
19

20 Maintain and enhance natural resource-based industries, including productive  
21 timber, agricultural, and fisheries industries. Encourage the conservation of  
22 productive forest lands and productive agricultural lands, and discourage  
23 incompatible uses.<sup>9</sup>

24 RCW 36.70A.040(4)(d) provides as follows:

25 [T]he county and each city that is located within the county shall adopt a  
26 comprehensive plan and development regulations that are consistent with  
27 and implement the comprehensive plan not later than four years from the date  
28 the county legislative authority adopts its resolution of intention, but a county  
29 or city may obtain an additional six months before it is required to have  
30 adopted its development regulations by submitting a letter notifying the  
31 \*department of community, trade, and economic development of its need prior

32 <sup>8</sup> The Concerned Friends of Ferry County's, David L. Robinson's, and Futurewise's Reply Brief, pages 7-9  
(October 26, 2012).

<sup>9</sup> RCW 36.70A.020(8).

1 to the deadline for adopting both a comprehensive plan and development  
2 regulations.

3 Under RCW 36.70A.070, the Comprehensive Plan shall be an internally consistent  
4 document and all elements shall be consistent with the future land use map. The term  
5 “consistency” has been defined as follows: “Consistency means comprehensive plan  
6 provisions are compatible with each other. One provision may not thwart another.”<sup>10</sup>  
7

8 RCW 36.70A.120 provides as follows:  
9

10 Each county and city that is required or chooses to plan under RCW  
11 36.70A.040 shall perform its activities and make capital budget decisions in  
12 conformity with its comprehensive plan.

13 The GMA requires Ferry County to designate “Forest lands that are not already  
14 characterized by urban growth and that have long-term significance for the commercial  
15 production of timber.”<sup>11</sup> These forest land designations were required to be adopted on or  
16 before September 1, 1991.  
17

18 “Forest land” is defined as follows:

19 [L]and primarily devoted to growing trees for long-term commercial timber  
20 production on land that can be economically and practically managed for such  
21 production, including Christmas trees subject to the excise tax imposed under  
22 RCW 84.33.100 through 84.33.140, and that has long-term commercial  
23 significance. In determining whether forest land is primarily devoted to  
24 growing trees for long-term commercial timber production on land that can be  
25 economically and practically managed for such production, the following  
26 factors shall be considered: (a) The proximity of the land to urban, suburban,  
27 and rural settlements; (b) surrounding parcel size and the compatibility and  
28 intensity of adjacent and nearby land uses; (c) long-term local economic  
29 conditions that affect the ability to manage for timber production; and (d) the  
30 availability of public facilities and services conducive to conversion of forest  
31 land to other uses.<sup>12</sup>  
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<sup>10</sup> *Five Mile Prairie Neighborhood Association et al. v. Spokane County*, GMHB Case No. 12-1-0002, Final Decision and Order (August 23, 2012), at 10.

<sup>11</sup> RCW 36.70A.170(1)(b).

<sup>12</sup> RCW 36.70A.030(8).

1 Under the "Minimum Guidelines" in WAC 365-190-060(2)(c), counties should determine  
2 which land grade constitutes forest land of long-term commercial significance, based on  
3 local physical, biological, economic, and land use considerations. Counties should use the  
4 private forest land grades of the Department of Revenue (WAC 458-40-530).

5  
6 **Board Analysis and Findings**

7 Subissue A: Petitioners allege there are significant inconsistencies between Natural  
8 Resource Policies adopted in Ordinance No. 2011-04, Comprehensive Plan Section 7.4.30,  
9 and pre-existing Comprehensive Plan Section 7.4.35 entitled "Forest Land Soils."<sup>13</sup>  
10 Petitioners also question language in Section 7.4.30 stating that in designating forest lands,  
11 it is County policy to consider Department of Commerce Minimum Guidelines together with  
12 additional local criteria. Ferry County asserts there is no internal plan inconsistency, just  
13 general policy language in one part of the plan, with more specific criteria in another part of  
14 the plan.  
15

16  
17 The Board agrees with Ferry County that the presence of both general policy language and  
18 specific criteria language does not by itself create an internal plan consistency. To find an  
19 inconsistency, there must be a conflict or incompatibility between plan provisions. One part  
20 of the plan may not thwart another part of the plan.  
21

22  
23 It is necessary and appropriate for the policy to require consideration of the Department of  
24 Commerce designation guidelines and factors as well as local designation criteria. Further,  
25 the Section 7.4.35 language appears not in a designation provision but rather in a section  
26 called "Forest Land Soils."<sup>14</sup> The "Designation of Forest Lands" is discussed in Section  
27 7.4.38. Petitioners have failed to show a conflict or incompatibility constituting an internal  
28 plan inconsistency.  
29

30 Subissue B: Petitioners allege an internal plan inconsistency, contrary to RCW 36.70A.070,  
31

32 <sup>13</sup> Futurewise's Prehearing Brief, pages 6-8 (January 17, 2012).

<sup>14</sup> Ferry County Ordinance No. 2011-04, page 5 (August 8, 2011).

1 because the County has not updated its future land use map to reflect new criteria and  
2 resource land policies. However, Petitioners failed to come forward with any evidence of a  
3 conflict or incompatibility between the map and the new policies. Thus, Petitioners failed to  
4 satisfy their burden to prove clearly erroneous action by the County as to this subissue.  
5

6 Subissue C: Petitioners assert a violation of RCW 36.70A.020(8), the GMA planning goal to  
7 “encourage the conservation of productive forest lands.” According to Petitioners, the  
8 “vague and undefined policies for designating forest lands” fail to provide the certainty  
9 needed to conserve productive forest land. However, Petitioners did not come forward with  
10 evidence showing the County failed to encourage conservation of forest lands, and they did  
11 not allege a violation of any substantive requirement in the GMA beyond Planning Goal 8.  
12 Petitioners failed to satisfy their burden to prove clearly erroneous action as to Subissue C.  
13  
14

15 Subissue D: Petitioners allege a violation of RCW 36.70A.040(4)(d) [“development  
16 regulations that are consistent with and implement the comprehensive plan”] because the  
17 County has not updated its development regulations to reflect new criteria in resource land  
18 policies. But Petitioners have submitted no evidence of inconsistent provisions and have  
19 not presented any argument on a failure to implement the comprehensive plan. Thus,  
20 Petitioners have failed to carry their burden to show that adoption of Ordinance No. 2011-04  
21 created an inconsistency between the Comprehensive Plan and Development Regulations.  
22  
23

24 Subissue E: Petitioners abandoned this subissue in their reply brief.  
25

26 Subissue F: Petitioners initially alleged that the Department of Commerce Minimum  
27 Guidelines were not included, but in their reply brief Petitioners state that those Minimum  
28 Guidelines are now included in the comprehensive plan policies. Petitioners further alleged  
29 Policy 7.4.30 7a does not determine which land grades constitute forest land of long-term  
30 commercial significance.  
31

32 Policy 7.4.30 specifies that the DNR land grade and operability class should be considered



1 in designating forest resource lands. Also, Policy 7.4.35 specifically classifies Class I  
2 through Class IV Forest Lands by referencing Private Forest Land Grades. In addition,  
3 Policy 7.4.37 classifies forest lands of long-term significance based on Department of  
4 Revenue land grade.<sup>15</sup> Petitioners failed to carry their burden to prove clearly erroneous  
5 action.  
6

7 Subissue G: Petitioners withdrew this subissue in their reply brief.  
8

9 Conclusion: As to Issue No. 2, the Board finds and concludes that Petitioners failed to  
10 satisfy their burden to prove Ferry County's actions were clearly erroneous in adopting  
11 Ordinance No. 2011-04 relating to Forest Lands of Long-Term Commercial Significance.  
12 The County is in compliance with respect to Issue 2, and Issue 2 is dismissed.  
13

14 **Issue 3:** Do the criteria, policies, and narrative for designating mineral resource lands of  
15 long-term commercial significance and the Future Land Use Map as amended in Ferry  
16 County Ordinance No. 2011-04 fail to comply with RCW 36.70A.020(8), -.040, -.050, -.060, -  
17 .070, -.170(1)(c), and WAC 365-190-070 and substantially interfere with the GMA goals  
18 (RCW 36.70A.020)?

19 **Applicable Law**

20 Under RCW 36.70A.070, the Comprehensive Plan shall be an internally consistent  
21 document and all elements shall be consistent with the future land use map. The term  
22 "consistency" has been defined as follows: "Consistency means comprehensive plan  
23 provisions are compatible with each other. One provision may not thwart another."<sup>16</sup>  
24

25 The GMA requires Ferry County to designate "[m]ineral resource lands that are not already  
26 characterized by urban growth and that have long-term significance for the extraction of  
27 minerals."<sup>17</sup> These mineral land designations were required to be adopted on or before  
28 September 1, 1991.  
29

30  
31 <sup>15</sup> *Id.* at pages 3, 6.

32 <sup>16</sup> *Five Mile Prairie Neighborhood Association et al. v. Spokane County*, GMHB Case No. 12-1-0002, Final  
Decision and Order (August 23, 2012), at 10.

<sup>17</sup> RCW 36.70A.170(1)(c).

1 The GMA also requires Ferry County to “adopt development regulations on or before  
2 September 1, 1991, to assure the conservation of . . . mineral resource lands.”<sup>18</sup>  
3

4 WAC 365-190-070 provides the “Minimum Guidelines” and criteria that must be considered  
5 when designating Mineral Resource Lands:  
6

7  
8 (1) In designating mineral resource lands, counties and cities must approach  
9 the effort as a county-wide or regional process, with the exception of owner-  
10 initiated requests for designation. Counties and cities should not review  
11 mineral resource lands designations solely on a parcel-by-parcel basis.

12 (2) Counties and cities must identify and classify mineral resource lands from  
13 which the extraction of minerals occurs or can be anticipated. Counties and  
14 cities may consider the need for a longer planning period specifically to  
15 address mineral resource lands, based on the need to assure availability of  
16 minerals for future uses, and to not inadvertently preclude access to available  
17 mineral resources due to incompatible development. Other proposed land  
18 uses within these areas may require special attention to ensure future supply  
19 of aggregate and mineral resource material, while maintaining a balance of  
20 land uses.

21 (3) Classification criteria.

22 (a) Counties and cities classify mineral resource lands based on geologic,  
23 environmental, and economic factors, existing land uses, and land  
24 ownership. It is expected that mineral resource lands will be depleted of  
25 minerals over time, and that subsequent land uses may occur on these  
26 lands after mining is completed. Counties and cities may approve and  
27 permit land uses on these mineral resource lands to occur after mining is  
28 completed.

29 (b) Counties and cities should classify lands with potential long-term  
30 commercial significance for extracting at least the following minerals:  
31 Sand, gravel, and valuable metallic substances. Other minerals may be  
32 classified as appropriate.

(c) When classifying these areas, counties and cities should use maps

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<sup>18</sup> RCW 36.70A.060(1)(a).

1 and information on location and extent of mineral deposits provided by the  
2 department of natural resources, the United States Geological Service and  
3 any relevant information provided by property owners. Counties and cities  
4 may also use all or part of a detailed minerals classification system  
5 developed by the department of natural resources.

6 (d) Classifying mineral resource lands should be based on the geology  
7 and the distance to market of potential mineral resource lands, including:

8 (i) Physical and topographic characteristics of the mineral resource  
9 site, including the depth and quantity of the resource and depth of the  
10 overburden;

11 (ii) Physical properties of the resource including quality and type;

12 (iii) Projected life of the resource;

13 (iv) Resource availability in the region; and

14 (v) Accessibility and proximity to the point of use or market.

15 (e) Other factors to consider when classifying potential mineral resource  
16 lands should include three aspects of mineral resource lands:

17 (i) The ability to access needed minerals may be lost if suitable mineral  
18 resource lands are not classified and designated; and

19 (ii) The effects of proximity to population areas and the possibility of  
20 more intense uses of the land in both the short and long-term, as  
21 indicated by the following:

22 (A) General land use patterns in the area;

23 (B) Availability of utilities, including water supply;

24 (C) Surrounding parcel sizes and surrounding uses;

25 (D) Availability of public roads and other public services; and

26 (E) Subdivision or zoning for urban or small lots.

27 (iii) Energy costs of transporting minerals.

1  
2 (4) Designation of mineral resource lands.

3 (a) Counties and cities must designate known mineral deposits so that  
4 access to mineral resources of long-term commercial significance is not  
5 knowingly precluded. Priority land use for mineral extraction should be  
6 retained for all designated mineral resource lands.

7 (b) In designating mineral resource lands, counties and cities should  
8 determine if adequate mineral resources are available for projected needs  
9 from currently designated mineral resource lands.

10 (c) Counties and cities may consult with the department of transportation  
11 and the regional transportation planning organization to determine  
12 projected future mineral resource needs for large transportation projects  
13 planned in their area.

14 (d) In designating mineral resource lands, counties and cities must also  
15 consider that mining may be a temporary use at any given mine,  
16 depending on the amount of minerals available and the consumption rate,  
17 and that other land uses can occur on the mine site after mining is  
completed, subject to approval.

18 (e) Successful achievement of the natural resource industries goal set  
19 forth in RCW 36.70A.020 requires the conservation of a land base  
20 sufficient in size and quality to maintain and enhance those industries and  
21 the development and use of land use techniques that discourage uses  
22 incompatible with the management of designated lands.

23 **Board Analysis and Findings**

24 Ferry County Ordinance No. 2011-04 adopted a table entitled "Designated Resource  
25 Lands." This table indicates that 1.4 million acres have the resource land designation  
26 "Mineral."<sup>19</sup>  
27

28 Ordinance No. 2011-04 also adopted "Natural Resources Policies." Policy 9 states:

29 Designate areas with existing mining operations subject to DNR permits on  
30 the County's future land use maps. Designation of these sites is intended to  
31 ensure that they are protected from incompatible uses, and to raise public  
32

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<sup>19</sup> Ferry County Ordinance No. 2011-04, page 2 [Comprehensive Plan p. 7-19] (August 8, 2011).

1 awareness of the potential for mining activities in an area. Designation on the  
2 land use map shall not be a pre-condition to mining.<sup>20</sup>

3 Petitioners assert the Comprehensive Plan is not internally consistent because Ferry County  
4 has 1.4 million acres in the entire County, including the City of Republic, but the County has  
5 only designated “existing mining operations subject to DNR permits.”<sup>21</sup> Ferry County  
6 responds by saying “the County’s intention has always been to designate its jurisdiction as  
7 mineral lands.”<sup>22</sup>  
8

9  
10 The Board agrees that designation of the entire land area of Ferry County as Mineral  
11 Resource Lands is not consistent with designating just existing mining operations subject to  
12 DNR permits. Those would be conflicting or incompatible geographic designations because  
13 a large land area would be included as Mineral Resource Lands under one part of the  
14 Comprehensive Plan while at the same time be excluded from Mineral Resource Lands  
15 under a different part of the Comprehensive Plan. Thus, Ordinance No. 2011-04 created an  
16 internal inconsistency in the Comprehensive Plan.  
17

18 Furthermore, Ordinance No. 2011-04 contains no map showing the location of Mineral  
19 Resource Lands. The GMA provides that a Comprehensive Plan shall consist of a map or  
20 maps, together with descriptive text.<sup>23</sup> After reviewing the entire record in this case, the  
21 Board notes that Ferry County’s Comprehensive Plan appears to lack a Future Land Use  
22 Map showing Mineral Resource Lands. The absence of a map in this record makes it very  
23 difficult to ascertain the County’s intent in designating Mineral Resource Lands.  
24  
25  
26

27 <sup>20</sup> Ferry County Ordinance No. 2011-04, page 3 [Comprehensive Plan p. 7-20] (August 8, 2011).

28 <sup>21</sup> Futurewise’s Prehearing Brief, pages 13-14 (January 17, 2012). In their Reply Brief (page 20), Petitioners  
29 state that they have dropped their legal arguments concerning Subissues B, C, and D because the County has  
30 “fixed” and “cured” these alleged GMA violations. Accordingly, the Board will not address Subissues B, C, and  
31 D in this FDO. In their Reply Brief (page 19), Petitioners also present legal arguments relating to Ferry County  
32 Ordinance No. 2012-04 (adopted on September 24, 2012). That 2012 Ordinance was adopted well after the  
inception of this case, and is not before the Board in the present case. Accordingly, the Board will not address  
any legal arguments related to Ordinance No. 2012-04 in this FDO.

<sup>22</sup> Ferry County’s Prehearing Brief, page 8 (February 6, 2012).

<sup>23</sup> RCW 36.70A.070.

1 The Board is left with the firm and definite conviction that a mistake has been made in the  
2 adoption of Ordinance No. 2011-04. As to Mineral Resource Lands, Ordinance No. 2011-  
3 04 is clearly erroneous in view of the entire record before the Board and in light of the goals  
4 and requirements of this chapter.

5  
6 The Board finds and concludes that Ferry County is not in compliance with the requirements  
7 of the GMA relating to the designation of Mineral Resource Lands of Long-Term  
8 Commercial Significance under RCW 36.70A.070 and RCW 36.70A.170.  
9

10 **Issue 4:** Did the County fail to comply with RCW 36.70A.040, -.050, -.060, -.070, -.120, and  
11 -.172 and interfere substantially with GMA goals (RCW 36.70A.020) by modifying,  
12 eliminating and or excluding adequate "Policies" and development standards for resource  
13 lands including the setting of minimum lot sizes for agricultural lands in Ferry County  
14 Ordinance No. 2011-04 and Ferry County Ordinance No. 2011-03?<sup>24</sup>

15 **Applicable Law**

16 RCW 36.70A.040(4)(d) provides as follows:

17 [T]he county and each city that is located within the county shall adopt a  
18 comprehensive plan and development regulations that are consistent with  
19 and implement the comprehensive plan not later than four years from the date  
20 the county legislative authority adopts its resolution of intention, but a county  
21 or city may obtain an additional six months before it is required to have  
22 adopted its development regulations by submitting a letter notifying the  
23 \*department of community, trade, and economic development of its need prior  
24 to the deadline for adopting both a comprehensive plan and development  
regulations.

25 RCW 36.70A.060 provides in pertinent part as follows:

26 (1)(a) . . . each county that is required or chooses to plan under RCW  
27 36.70A.040, and each city within such county, shall adopt development  
28 regulations on or before September 1, 1991, to assure the conservation of  
29 agricultural, forest, and mineral resource lands designated under RCW  
30 36.70A.170. Regulations adopted under this subsection may not prohibit uses

31 <sup>24</sup> Issue Statement No. 4 refers *inter alia* to RCW 36.70A.050 and -.172. However, Petitioners failed to brief  
32 subissues related to RCW 36.70A.050 and -.172. Under WAC 242-03-590(1), the failure of a party to brief an  
issue "shall constitute abandonment of the unbriefed issue." Accordingly, the Board deems any subissues  
relating to RCW 36.70A.050 and -.172 to have been abandoned by Petitioners.

1 legally existing on any parcel prior to their adoption and shall remain in effect  
2 until the county or city adopts development regulations pursuant to RCW  
3 36.70A.040. Such regulations shall assure that the use of lands adjacent to  
4 agricultural, forest, or mineral resource lands shall not interfere with the  
5 continued use, in the accustomed manner and in accordance with best  
6 management practices, of these designated lands for the production of food,  
7 agricultural products, or timber, or for the extraction of minerals.

7 (3) Such counties and cities shall review these designations and development  
8 regulations when adopting their comprehensive plans under RCW  
9 36.70A.040 and implementing development regulations under RCW  
10 36.70A.120 and may alter such designations and development regulations to  
11 insure consistency.

11 RCW 36.70A.120 provides as follows:

12 Each county and city that is required or chooses to plan under RCW  
13 36.70A.040 shall perform its activities and make capital budget decisions in  
14 conformity with its comprehensive plan.

15 **Board Analysis and Findings**

16 Respondent Ferry County asserts that the Board's jurisdiction is limited to plans,  
17 regulations, and amendments that are currently in effect, not provisions that have been  
18 repealed or superseded, and the County further asserts the Board lacks jurisdiction to hear  
19 and decide this issue related to deleting certain language from the comprehensive plan and  
20 development regulations. Moreover, the County asserts that if the Board reaches the merits  
21 of this issue, repeal of the cited comprehensive plan and development regulations did not  
22 repeal or diminish the right to farm law, the open range law, water rights law, or other non-  
23 GMA laws bearing on the regulation of land use."<sup>25</sup>

24  
25  
26  
27 Petitioners allege that this issue challenges the deletion of language that is a type of  
28 amendment, and challenges to amendments are specifically allowed.

29  
30 The challenged ordinances<sup>26</sup> amended Ferry County's Comprehensive Plan and  
31

32 <sup>25</sup> Ferry County's Prehearing Brief, page 9 (February 6, 2012).

<sup>26</sup> Ferry County Ordinance Nos. 2011-03 and 2011-04 (August 8, 2011).

1 Development Regulations by deleting certain narratives and policies that were contained in  
2 earlier versions of the Comprehensive Plan or Development Regulations.<sup>27</sup> The GMA  
3 specifically provides that the Board has jurisdiction over “amendments” to comprehensive  
4 plans and development regulations.<sup>28</sup> Accordingly, the Board finds that it has jurisdiction to  
5 hear and decide this Issue 4.  
6

7 On the merits, Petitioners state that the language eliminated by the amendment includes a  
8 general narrative that explains the need to conserve agricultural lands and the benefits of  
9 agriculture to the Ferry County economy.<sup>29</sup> Also, Petitioners argue that the County has  
10 deleted critical previous policies such as an emphasis on the beneficial tax status of  
11 agricultural lands, the “Open Range Law,” agricultural land priority over urban uses, access  
12 rights to off-site water from agricultural lands, and access through agricultural lands to reach  
13 adjacent private property.<sup>30</sup> Petitioners allege that this deleted information is needed to  
14 conserve agricultural lands of long-term commercial significance and assure that the use of  
15 lands adjacent to agricultural resource lands does not interfere with agriculture.  
16  
17

18 The Board notes that the basic narrative that has been deleted provided a necessary  
19 explanation of the unique historical and statistical characteristics of agricultural lands in  
20 Ferry County that need to be understood to be adequately categorized and protected.<sup>31</sup> For  
21 example, policy language in previous Ferry County Comprehensive Plan Policy 7.7.4 cites  
22 the following information about Ferry County:  
23

24           Ferry County has approximately 109,086 acres in crops and rangeland.  
25           There are approximately 204 Farms and Ranches in Ferry County. Of these,  
26

27 <sup>27</sup> Under WAC 242-03-630(4), the Board takes official notice of Ferry County Ordinance No. 2009-04 which  
28 was the ordinance amended by the currently challenged Ordinance No. 2011-03 together with official notice of  
29 Ordinance No. 2008-01 that adopted the Ferry County Comprehensive Plan, which was amended by the  
30 currently challenged Ordinance No. 2011-04.

31 <sup>28</sup> RCW 36.70A.280(1)(a) and RCW 36.70A.290(2).

32 <sup>29</sup> Futurewise’s Prehearing Brief, page 21 (January 17, 2012).

<sup>30</sup> Petitioners quote the “repealed language” on pages 18-20 and 21 of their Prehearing Brief (January 17,  
2012).

<sup>31</sup> Ferry County has a very high proportion of federal, state, tribal, and other publically-owned lands. The  
commercial viability of agriculture in the County is largely dependent on use of publicly-owned land in  
conjunction with privately-owned land.



1 approximately 88 have agriculture as their principle operation. The major  
2 agricultural industry in this acreage are beef cow/calf production. Next is  
3 timber/tree farms, and finally hay and grain production.

4 Lands currently in crop production total approximately 29,300 acres. These  
5 lands generally lie in the valley bottoms. This land is limited in its extent  
6 because of the non-variable factors, such as good soils and topographic  
7 restrictions to crop production. Climate plays a key factor because of the  
8 short growing season restricts crop growth. Private range land is  
9 approximately 79,786 acres allowing cattle ranches to be more diverse in  
10 areas. Also, Forest Service lands and Tribal lands are leased for grazing.  
11 Ferry County has the largest average size of farm in the State at 3,489 acres.  
12 The average value of farm is also the highest in the State at over \$1.1 million.

13 The number of cattle in Ferry County has increased from 16,800 to 21,000  
14 from 1987 through 1991 . . . The number of farms has decreased from 241 to  
15 204 in the past ten years. . . . However, many farms are consolidating, and  
16 these remaining farms may be increasing in size. There is also a factor to  
17 consider about the uncertainty of leased range units on publicly owned land.  
18 Without the option of these leases, many ranches would not be able to  
19 operate. . . .

20 The County strives to preserve Agricultural lands in Ferry County. There are  
21 lands in Ferry County which do not meet Prime farmland and Unique  
22 farmland, but are useful and necessary to Ferry County which therefore need  
23 to be protected and promoted.<sup>32</sup>

24 The deleted information also noted that the remaining farms are getting larger, are often  
25 dependent on leased lands and are more spread out.

26 The Board agrees that this statistical, historical and descriptive text is critical to the proper  
27 designation and protection of key Ferry County Agricultural Lands of Long Term  
28 Commercial Significance in Ferry County's Comprehensive Plan policies and development  
29 regulations.<sup>33</sup> For example, it states that key farm lands in Ferry County are related to cattle

30 <sup>32</sup> Ferry County Comprehensive Plan Policy, section 7.7.4 (former), Futurewise's Prehearing Brief, Attachment  
31 2008-01 (January 17, 2012).

32 <sup>33</sup> RCW 36.70A.070 requires descriptive text covering objectives, principles, and standards used to develop  
the comprehensive plan. The County is free to **update** the information in the narrative, but needs to continue  
to include "descriptive text" in its Comprehensive Plan.

1 production, including grazing on private lands and on public and tribal lands. Lands that  
2 support cattle production, such as hay production, also appear to be related to supporting  
3 the cattle industry. Also, the cattle lands depend on continued availability of leased lands  
4 on Forest Service and Tribal lands. Futurewise also points out that continued grazing on  
5 public lands depends on retaining private land "home bases" which are required to qualify  
6 for leasing public lands. Without the cited descriptive and statistical information provided in  
7 Comprehensive Plan Section 7.7.4, it is difficult, if not impossible, to clarify which  
8 agricultural lands the County needs to protect and ways to protect the key Ferry County  
9 agricultural lands.  
10

11  
12 Futurewise also points to the following deleted policy included in 7.7.4 that was aimed at  
13 making sure that adjacent nonfarm land use does not negatively affect key farm lands:

14       Access to residential properties through agricultural lands shall not traverse  
15       any land unless it is the only feasible means of serving the property and legal  
16       access has been granted by the owner.<sup>34</sup>

17  
18 The Board agrees that this policy, aimed at making sure development next to key  
19 agricultural lands does not harm agricultural uses, helps protect key Ferry County  
20 agricultural lands.

21  
22 The Board finds Petitioners' other arguments pertaining to open range and priority to  
23 agricultural lands and development regulations lack merit. Beyond conclusory statements,  
24 Petitioners did not come forward with any evidence that leaving out these open range and  
25 priority policies would thwart the conservation of resource lands or encourage adjacent land  
26 uses that would interfere with agricultural activities. The excluded language pertaining to  
27 open range and priority to agricultural lands appears to duplicate other laws or policies that  
28 support agricultural activities and thus does not add necessary descriptive text to the  
29 Comprehensive Plan.  
30

31  
32 <sup>34</sup> Ferry County Comprehensive Plan Policy, section 7.7.4 (former), Futurewise's Prehearing Brief, Attachment  
2008-01 (January 17, 2012).

1 Petitioners failed to come forward with evidence that these amendments undermine the  
2 support provided or protection afforded to agriculture by the Open Range law (RCW  
3 Chapter 16.24), Open Space/Agriculture law, or property rights laws pertaining to  
4 easements/adjacent parcel access. Finally, Section 7.00 Ferry County's Development  
5 Regulations, as amended, contains the following "Resource Lands Notice":  
6

7 All development permits and building permits issued for development  
8 activities on rural lands shall contain a notice that the subject property may be  
9 on/or within one thousand three hundred twenty feet (1320') of lands  
10 designated agricultural lands, forest lands, or mineral resource lands on  
11 which a variety of commercial activities may occur that are not compatible  
12 with residential development. In the case of mineral resource lands, an  
13 application might be made for mining related activities including mining,  
14 extraction, washing, crushing, stockpiling, blasting, transporting, and recycling  
15 of minerals.<sup>35</sup>

16 The Board notes that Ferry County's 1,320' notice is significantly more than the minimum  
17 500' notice required by the GMA.<sup>36</sup>

18 The Board also notes that both Ferry County and Futurewise agree on a minimum lot size of  
19 one housing unit per 20 acres for agricultural lands.  
20

21 As to Issue 4, the Board is left with the firm and definite conviction that a mistake has been  
22 made in the adoption of Ordinance No. 2011-04. As to Resource Land Policies, Ordinance  
23 No. 2011-04 is clearly erroneous in view of the entire record before the Board and in light of  
24 the goals and requirements of this chapter.  
25

26 The Board finds and concludes that Ferry County is not in compliance with the requirements  
27 of the GMA by modifying, eliminating and or excluding adequate policies and development  
28 standards for resource lands under RCW 36.70A.060, RCW 36.70A.070, and RCW  
29 36.70A.120.  
30

31  
32 <sup>35</sup> Ferry County Development Regulations, Ordinance No. 2011-03, page 13 (August 8, 2011).

<sup>36</sup> RCW 36.70A.060(1)(b).

1  
2 **VI. DETERMINATION OF INVALIDITY**

3 Petitioners request that the Board impose invalidity on Ferry County Policies "7.4.30 7 and  
4 8." RCW 36.70A.302(1) provides:

5 1) A board may determine that part or all of a comprehensive plan or  
6 development regulations are invalid if the board:

7 (a) Makes a finding of noncompliance and issues an order of remand  
8 under RCW 36.70A.300;

9 (b) Includes in the final order a determination, supported by findings of fact  
10 and conclusions of law, that the continued validity of part or parts of the  
11 plan or regulation would substantially interfere with the fulfillment of the  
12 goals of this chapter; and

13 (c) Specifies in the final order the particular part or parts of the plan or  
14 regulation that are determined to be invalid, and the reasons for their  
15 invalidity.

16 A determination of invalidity can only be issued if the Board first makes a finding of  
17 noncompliance relating to Policies 7.4.30 7 and 8; these policies primarily involve the  
18 designation of forest lands, which was addressed under Issue 2 in this case. However, the  
19 Board found compliance as to Issue 2 and dismissed that issue. Accordingly, invalidity  
20 cannot be imposed as to Policies 7.4.30 7 and 8.  
21

22  
23 **VII. ORDER**

24 Based on the foregoing, the Board finds and concludes as follows:

- 25 1. Issue 2 is dismissed.  
26  
27 2. Ferry County is not in compliance with the requirements of the GMA relating to the  
28 designation of Mineral Resource Lands of Long-Term Commercial Significance under  
29 RCW 36.70A.070 and RCW 36.70A.170.  
30  
31 3. Ferry County is not in compliance with the requirements of the GMA by modifying,  
32 eliminating and/or excluding adequate policies and development standards for  
resource lands under RCW 36.70A.060, RCW 36.70A.070, and RCW 36.70A.120.

- 1 4. Ferry County's enactment of Ordinance No. 2011-04, as it pertains to Mineral  
2 Resource Lands and Resource Lands Policies, was clearly erroneous in view of the  
3 entire record before the Board and in light of the goals and requirements of the GMA.  
4 5. Ordinance No. 2011-04, as it relates to Issues 3 and 4 in this case, is remanded to  
5 Ferry County, and the County shall take further actions to come into compliance with  
6 the GMA consistent with this Final Decision and Order.  
7

8 The following schedule for compliance, briefing and hearing shall apply:  
9

10

Item	Date Due
<b>Compliance Due</b>	<b>May 15, 2013</b>
Compliance Report and Index to Compliance Record	May 29, 2013
Objections to a Finding of Compliance	June 12, 2013
Response to Objections	June 24, 2013
<b>Compliance Hearing - Telephonic</b> <b>Call 1-800-704-9804 and use pin 5721566#</b>	<b>July 2, 2013</b> <b>10:00 a.m.</b>

11  
12  
13  
14  
15  
16  
17

18 Entered this 17<sup>th</sup> day of December, 2012.  
19

20 \_\_\_\_\_  
Raymond L. Paolella, Board Member

21  
22 \_\_\_\_\_  
Chuck Mosher, Board Member

23  
24 \_\_\_\_\_  
Margaret Pageler, Board Member  
25  
26  
27

28 **Pursuant to RCW 36.70A.300 this is a final order of the Board.**<sup>37</sup>  
29

30 <sup>37</sup> Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all  
31 parties within ten days of mailing of the final order. WAC 242-03-830(1), -840. A party aggrieved by a final  
32 decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW  
34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to  
review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized  
to provide legal advice.